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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1519

CEICEL D. BROWN and WILLIAM D. BROWN,
Petitioners,

vs.

THOMAS P. SCOTT,
Respondent.

RESPONSE TO RESPONDENT'S MOTION THAT PETITIONERS' MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI BE DENIED

Petitioners respectfully show unto the Court that their motion for leave to file Petition for Writ of Certiorari under Section 1254 of Title 28 of the United States Code, to the United States Court of Appeals for the Eighth Circuit was duly granted and the Petition for Writ of Certiorari was filed May 20, 1972. It is this Petition for Writ of Certiorari which is now before this Court, and petitioners respectfully submit that it should be granted.

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REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In reply to Respondent's brief in opposition to the Petition for Writ of Certiorari petitioners respectfully call the Court's attention to the following matters:

I.

In response to petitioners' first contention, to wit: that the judgment below deprives petitioners of their property without due process of law, and is in violation of the Fifth Amendment to the Constitution of the United States; respondent contends that this question has been waived, and cites in support of that contention *Brody et al.* v. *State of Connecticut et al.*, 91 S. Ct. 780. Petitioners respectfully submit that the record in this case shows conclusively that there has been no waiver of the failure of the respondent to give petitioners notice of the defense relied upon. Petitioners tried—in every way available to them within the limited time allowed before the date set for trial by the District Judge who had assumed jurisdiction of the case—to determine what, if any, defense respondent was relying upon, but without success; and as soon as it became apparent from respondent's testimony that he intended to offer the affirmative defense of gift, petitioners objected thereto upon the ground that it had not been pleaded and petitioners had had no notice of any such defense. (R. pp. 61-62) And at all times since they have strenuously maintained that the admission of such defense was prejudicial error.

Petitioners find that the case reported in 91 Supreme Court 780 is entitled: *Gladys Boddie et al.* v. *The State of Connecticut et al.*, 401 U.S. 371, 28 L.Ed.2d 113, 91 S. Ct.

780. Examination of this case discloses no support for respondent's position; on the contrary, it is strong support for petitioners' contention that they have been deprived of their property without due process of law. There this Court said:

(401 U.S. 377-379) "(3, 4) * * * Although '(m)any controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote for the Court in Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 94 L.Ed. 865, 70 S. Ct. 652 (1950), 'there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Id., at 313, 94 L.Ed. at 873.

"(5-10) Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. * * * What the Constitution does require is 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner,' Armstrong v. Manzo, 380 U.S. 545, 552, 14 L.Ed.2d 62, 66, 86 S. Ct. 1187 (1965) (emphasis added), 'for (a) hearing appropriate to the nature of the case.' Mullane v. Central Hanover Tr. Co., supra, at 313, 94 L.Ed. at 873. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid govern-

mental interest is at stake that justifies postponing the hearing until after the event. * * *"

There was no question of waiver involved in that case, and the brief statement: "That the hearing required by due process is subject to waiver," is the only reference to waiver in that opinion. But it is the notice and opportunity for hearing, which is there stated to be the minimum requirement of the Due Process Clause, which have been denied petitioners in the instant case.

Questions II, III, IV, V and VI

In response to petitioners' questions II, III, IV, V and VI, respondent merely states: "The United States District Court for the Western District of Arkansas, considered separately all of the Rules cited, and found plaintiffs contentions to be without merit." He submits no argument and cites no rules or authorities in support of that finding; this, we submit, for the very simple reason that there are none.

Following his "Statement," page 4 of his brief, respondent cites—

Whitfield v. *Metropolitan Life Ins. Co.*, 262 F. Supp. 977-983

E. A. Hobbs, Administrator v. *Preston* (should be *Collins*), 354 S.W.2d 551, 234 Ark. 779.

These cases have no bearing upon the questions presented by the Petition for Writ of Certiorari, but relate to the merits of the case and what is necessary to establish a gift inter vivos.

CONCLUSION

In conclusion, petitioners respectfully submit that, for the reasons set forth in the petition, and because the actions of the courts below are plain error of such fundamental nature and the principles involved are of such importance to the public, the petition for writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Amy Burkett, the attorney of record for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of June, 1972, I served copies of the foregoing Reply Brief on Thomas P. Scott, the only Respondent and only other party interested herein, by mailing to Hon. Carlos B. Hill, his Attorney of Record, at his stated address, P.O. Box 4074, Fayetteville, Arkansas 72701, by United States Air Mail, postage fully prepaid.

Witness my signature this the 30th day of June, 1972.

Amy Burkett

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